

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

Lon Allen Clark,

Plaintiff,

v.

Cory McCormick; et al.,

Defendants.

Case No. 2:21-cv-00173-RFB-DJA

Order

Before the Court are Plaintiff Lon Allen Clark's motions for appointment of counsel (ECF Nos. 70, 78) and motion "for the Court to have Defendant produce unedited version of body cam footage" (ECF No. 71). Because the Court finds that Plaintiff's motions for appointment of counsel are premature, it denies his motions without prejudice. The Court construes Plaintiff's motion "for the Court to have Defendant produce unedited version of body cam footage" as a motion to compel. Because the Court cannot find that the footage was edited based on the parties' competing assertions, the Court denies Plaintiff's motion to compel without prejudice.

I. Discussion.

A. *The Court denies Plaintiff's motions for appointment of counsel.*

Courts have authority to request that an attorney represent any person unable to afford counsel. 28 U.S.C. § 1915(e)(1). Whether to appoint counsel is within the discretion of the district court and requires a showing of exceptional circumstances. *Agyeman v. Corrections Corp. of America*, 390 F.3d 1101, 1103 (9th Cir. 2004). To determine whether exceptional circumstances exist, courts consider the likelihood that the plaintiff will succeed on the merits as well as the plaintiff's ability to articulate his claims "in light of the complexity of the legal issues involved." *Id.* Neither factor is dispositive, and both must be viewed together. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986).

1 In *Kern v. Henry*, the Honorable District Judge Richard F. Boulware appointed counsel to
 2 an inmate who asserted that HDSP violated his Eighth Amendment rights by imposing
 3 unconstitutional conditions of confinement. *See Kern*, 2017 U.S. Dist. LEXIS 62435, at *1-4.
 4 The court first found that the inmate's claim was likely to succeed because it had survived
 5 summary judgment and would proceed to trial. *Id.* It then found that the inmate would have
 6 difficulty articulating his claim considering its complexity. *Id.* The court explained:

7 Plaintiff's Eighth Amendment conditions of confinement claim will
 8 involve both nuances of the law as it relates to different aspects of
 9 confinement, e.g. exercise and hygiene, and trial preparation in
 10 relation to witnesses who are confined (or were confined) with
 11 Plaintiff. While Plaintiff has been able to sufficiently raise genuine
 12 issues of material fact for the one claim that is proceeding, this
 13 standard is different and less burdensome than what he will face at
 14 trial. The court finds that complexity of the relevant legal issues and
 15 requirements for trial preparation in this case warrant the
 16 appointment of counsel.

17 *Id.*

18 Here, the Court denies Plaintiff's motions for appointment of counsel as premature. (ECF
 19 Nos. 70, 78). Defendant's motion for summary judgment is almost fully briefed and Plaintiff has
 20 just moved to stay his case. (ECF Nos. 79, 87). Plaintiff has demonstrated an ability to articulate
 21 his claims sufficiently enough to get him to the summary judgment stage. In the event he passes
 22 that stage, it is likely that, like the plaintiff in *Kern* who needed counsel to take his case to trial,
 23 Plaintiff will need similar help. But given that the motion for summary judgment is currently
 24 pending, Plaintiff has already filed his response, and Plaintiff has just sought a stay, granting him
 25 counsel at this stage would be premature. The Court thus denies Plaintiff's motions without
 26 prejudice, giving him leave to re-file his motion for counsel later.

27 ***B. The Court denies Plaintiff's motion to compel LVMPD to produce unedited***
 28 ***video.***

29 The Court liberally construes Plaintiff's motion as a motion to compel. If a party resists
 30 discovery, the requesting party may file a motion to compel. *See* Fed. R. Civ. P. 37(a)(1),
 31 (a)(3)(B)(iii)-(iv) ("A party seeking discovery may move for an order compelling an answer, [or]

1 production ... if ... (iii) a party fails to answer an interrogatory submitted under Rule 33; or (iv) a
2 party fails to produce documents ... as requested under Rule 34.”). However, here, the Court
3 cannot find that Defendants are resisting discovery. Plaintiff asserts that certain video time
4 stamps of the body worn camera footage he received do not match the date of the incident. (ECF
5 No. 71). He also asserts that the videos were produced in clips, rather than the full versions.
6 (*Id.*). Defendants assert that they produced sixty-eight body worn camera videos, none of which
7 were tampered with or edited. (ECF No. 75). Defendants filed only one of these videos—the
8 body worn camera footage of Officer Schotthoefer—with the Court. (ECF No. 77). However,
9 that video appears to be complete and unedited.

10 Based on the briefing before it, the Court cannot grant Plaintiff’s motion to compel.
11 Plaintiff and Defendants have completely different views about what Defendants produced to
12 Plaintiff. And the Court has only received one of these videos. Without more, the Court cannot
13 conclude that Defendants have edited the videos they produced to Plaintiff. The Court thus
14 denies Plaintiff’s motion to compel without prejudice.

15
16 **IT IS THEREFORE ORDERED** that Plaintiff’s motions to appoint counsel (ECF Nos.
17 70, 78) are **denied without prejudice**.

18 **IT IS FURTHER ORDERED** that Plaintiff’s motion to compel (ECF No. 71) is **denied**
19 **without prejudice**.

20
21 DATED: November 8, 2022



22
23 DANIEL J. ALBREGTS
24 UNITED STATES MAGISTRATE JUDGE
25
26
27
28